than to require a testator to ascertain and comply with the varying statutory requirements of every state where personalty subject to his disposal may happen to be.

If in the principal case the state of the donor recognized the appointing instrument as a will because valid as such at the testator's domicil,[19] then the law of the latter did contribute something toward effecting the transfer, and without departing at all from the common-law theory, a tax at the domicil could have been justified.

THE RIGHT *IN REM* IN ADMIRALTY. — Attention has been called recently in *The Pesaro*[1] to the conflict between the American and English views as to the nature of the right *in rem* in admiralty. In our courts, Mr. Justice Story in *The Malek Adhel*,[2] echoing the words of Chief Justice Marshall in an earlier case,[3] unequivocally adopts the doctrine that the action is against the ship itself, not the owner, — the strict *in rem* theory. The language of these cases has been closely adhered to.[4] The English courts have wavered,[5] but now hold that the right against the ship is merely in the nature of a foreign attachment, a proceeding *quasi in rem*.[6]

The theories of both courts find explanation in history. The American doctrine rests on an animistic theory, prevalent in the early stages of legal systems, which endowed an offending instrument with human qualities and fixed the instrument itself with responsibility for the injury.[7] It is not surprising that this doctrine persisted in admiralty, as, popularly, personification applies *par excellence* to a ship.[8] The origin of the English doctrine is more obscure. It probably developed

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[19] It may be fairly inferred from the opinion that if the will of the donee had first been probated in New York, the tax would have been upheld. But this can only be upon the ground that Massachusetts recognizes the instrument as a will because probated at the domicil. Where such probate is lacking, would not Massachusetts, to be consistent, test the *factum* of will by the *lex domicilii*, and thus in either case afford New York a basis for taxation?

[1] Dist. Ct. S. D. N. Y., Oct. 1, 1921. Here it was held that a libel *in rem* could be maintained against a ship in the commercial service of the Italian Government. For the facts of this case see RECENT CASES, *infra*, p. 337.

[2] 2 How. (U. S.) 210, 234 (1844).

[3] The Little Charles, 1 Brock. 347, 354 (1818).

[4] The China, 7 Wall. (U. S.) 53 (1868); The John G. Stevens, 170 U. S. 113 (1897); The Barnstable, 181 U. S. 464 (1901).

[5] See the conflicting decisions of Dr. Lushington in The Ticonderoga, Sw. 215 (1857), and The Druid, 1 W. Rob. 391 (1842).

[6] The Dictator, [1892] P. 304; The Dupleix, [1912] P. 8; The Parlement Belge, 5 P. D. 197 (1879); The Castlegate, [1893] A. C. 38; The Porto Alexandre, [1920] P. 30. See MAYERS, ADMIRALTY LAW AND PRACTICE IN CANADA, pp. 6–23.

[7] See HOLMES, THE COMMON LAW, Chap. I, for a complete exposition of this theory.

[8] Many of the old books express this idea. See 1 BLACK BOOK OF THE ADMIRALTY, 242; Clay *v.* Snelgrave, 1 Ld. Raym. 576 (1700); PARDESSUS, DROIT COMM., n. 961; 3 BLACK, BOOK OF THE ADMIRALTY, 103, 243, 345; Mors *v.* Slew, 3 Keb. 112, 114 (1673).

through the creeping in of common-law ideas during the long eclipse of the admiralty by the common-law judges.[9]

Analytically a right *in rem* is not a right in a thing, but the sum of all the rights *in personam* in respect to that thing.[10] It is the correlative of the duties of others not to touch that thing.[11] When the whole or nearly the whole world[12] is under such a duty, the sum of all the duties creates a right *in rem*. The courts of the jurisdiction which have power over the *res* may create such a composite of duties, adjusting the relations of everyone to the *res* according to their law. The English courts in effect adopt this theory, and determine the rights of all the world in the ship with the owner as well as the injured party in mind. The American courts, however, influenced by the conception that the ship is the wrongdoer, have naturally gone much further in cutting off the owner's rights in favor of an injured party. They have allowed the latter redress from the ship irrespective of demise,[13] compulsory pilotage,[14] or piracy of the crew.[15] In so holding they have frequently repeated the statement that the vessel itself is responsible.

But they have not followed the principle to its logical limits. It involves holding that the ship is the limit as well as the source of liability, but an action *in personam* against the owner may be brought.[16] Again in actions against vessels owned by foreign sovereigns, the courts have consistently considered the question of sovereign immunity,[17] though if the ship itself were the defendant that immunity would clearly not extend to it. Thus, in cases where the application of the doctrine would produce a particularly undesirable result, it is abandoned.

This judicial opportunism is unfortunate. A recognition and application of the true theory of a right *in rem* is desirable, since it would in

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[9] See MAYERS, ADMIRALTY LAW AND PRACTICE IN CANADA, p. 21, pointing out that in The Dictator, *supra*, at p. 311, the *in personam* theory was advanced on the authority of CLERKE, PRAXIS CURIAE ADMIRALITATIS, written in 1679, the darkest part of the admiralty eclipse. As, however, the struggle was primarily over jurisdiction, the substantive law may not have been affected.

[10] See Holmes, J., in Tyler *v.* The Court of Registration, 175 Mass. 71, 76, 55 N. E. 812, 814 (1900).

[11] See W. N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," 26 YALE L. J. 710.

The possessor of a right *in rem* has usually other powers, privileges, and immunities with respect to the *res* in question; *e.g.*, the owner of a *res* has (usually) the *privilege* of using it, the *power* of alienating it, and an *immunity* from any other person's exercising a power with respect to it. See W. N. Hohfeld, *supra*, at p. 746.

[12] The example given by Hohfeld, that though A is said to have a right *in rem* in Blackacre, yet B and C may have easements over it, shows that a right may be *in rem* and yet not bind the whole world.

[13] The Barnstable, n. 4, *supra*.

[14] The China, n. 4, *supra*.

[15] The Malek Adhel, n. 2, *supra*.

[16] Stevens *v.* Sandwich, 23 Fed. Cas. no. 13, 409 (D. Md., 1801). See Admiralty Rules, 254 U. S. 679 (1921). Congress has by statute, no doubt influenced by historical as well as economic considerations, limited the liability of an owner not personally at fault to the value of the ship. 9 STAT. AT L. 635 (1851). This was apparently the rule of the early maritime law. See the learned opinion of Judge Ware in The Rebecca, 20 Fed. Cas. no. 11, 619 (D. Me., 1831), and also Norwich Co. *v.* Wright, 13 Wall. (U. S.) 104 (1871).

[17] See The Schooner Exchange, 7 Cranch (U. S.) 116 (1811). See also the discussion in The Pesaro, note 1, *supra*.

all cases lead to a consideration of the interests of all persons involved. Before the transaction, whether it be furnishing supplies to, or a tort committed by the ship, the owner has, as one of that compound of rights *in personam* constituting a right *in rem*, a right that the present plaintiff shall not touch the ship. After the transaction, the situation may be reversed and the plaintiff given the right *in rem*, including a right that the owner himself shall not touch the ship until the plaintiff's claim be satisfied from it. Whether the transaction should produce this shifting of rights is ultimately a question of political and economic policy.[18] The interests of all parties must be considered and regulated in view of the peculiar circumstances of maritime affairs. The courts of the United States, it is submitted, should follow the English courts and develop on such bases reasoned principles of decision, rather than gloss over the real difficulties involved by the application of a chimerical rule based on an historical misconception.

VALIDITY OF A LABOR UNION BY-LAW INVOLVING EXPULSION FOR PETITIONING THE LEGISLATURE. —The long struggle of labor unions for a place in our legal scheme of things has been generally successful. No longer is their very existence attacked as a criminal conspiracy or a combination in restraint of trade. They are acknowledged as a desirable, or at least a necessary, feature of modern industry. The chief factor in the winning of such recognition, especially through legislative enactment, has been the force of collective action. A recent Pennsylvania decision,[1] which seriously impairs the unions' power to maintain their external unanimity in spite of internal differences, is therefore especially significant. A by-law of a local union of the Brotherhood of Railroad Trainmen provided that any member using his influence against the union's legislative representative should be expelled.[2] A member signed a petition to the state legislature asking a reconsideration of the Full Crew Law.[3] This action was admitted to come within the by-law and the member was expelled therefor. The court ordered him to be re-

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[18] Support for the American cases may be found in such considerations of economic policy. In contract cases perhaps few would deal with a ship if no lien could be obtained on her and the only right allowed were one against a foreign owner. The tort cases may be supported on the idea of a risk of the business. But these considerations are not conclusive and the arguments for and against it deserve more consideration than has been given them in our courts. An interesting analogy is to be noted in some states where statutes have been passed giving a lien on an automobile causing an injury, even when driven by one other than the owner or his agent. See 1905 LAWS OF TENN., c. 173, § 5; 1912 ACTS OF S. CAR., p. 737.

[1] Spayd *v.* Ringing Rock Lodge, etc., 113 Atl. 70 (Pa. 1921). For a statement of the facts of this case, see RECENT CASES, *infra*, p. 348.

[2] "Any member of the brotherhood using his influence to defeat any action taken by the national legislative representative or any action regularly taken by the legislative representatives in meeting assembled, or of legislative boards under their proper authorities, shall, upon conviction thereof be expelled."

[3] 1911 PA. P. L., 1053; PA. STAT., §§ 18655–18663. See Pennsylvania, etc. Co. *v.* Ewing, 241 Pa. St. 581, 88 Atl. 775 (1913).